

Legal 500

Country Comparative Guides 2024

Germany

Public Procurement

Contributor

KP Partners



Paolina Ilieva

Partner | paolina.ilieva@kp-partners.de

This country-specific Q&A provides an overview of public procurement laws and regulations applicable in Germany.

For a full list of jurisdictional Q&As visit legal500.com/guides

Germany: Public Procurement

*"Complex contracts" refers to contracts including: where the needs of the contracting authority cannot be met without adaptation of readily available solutions; contracts involving design or innovative solutions; where prior negotiation is required before a contract can be awarded due to particular circumstances related to the nature, the complexity or the legal or financial make-up of a contract or because of risks attaching to these circumstances; and where technical specifications cannot be determined with sufficient precision with reference to established technical standards, references or specifications.

1. Please summarise briefly any relationship between the public procurement / government contracting laws in your jurisdiction and those of any supra-national body (such as WTO GPA, EU, UNCITRAL).

Germany's public procurement legislation is vastly influenced by supra-national bodies, particularly the European Union (EU) and the World Trade Organization (WTO). These international organizations shape and standardize procurement practices within Germany, ensuring alignment with the established broader international standards set to procure fairness, transparency, fair competition and participation opportunities for enterprises of all sizes.

The Public Procurement Framework in Germany as of today represents to significant extent an implementation of a number of European Directives regulating the Public Procurement Sector in the EU. In particular:

- DIRECTIVE 2014/24/EU of 26 February 2014 on public procurement ("*Vergabekoordinierungsrichtlinie*");
- DIRECTIVE 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors ("*Sektorenkoordinierungsrichtlinie*");
- DIRECTIVE 2014/23/EU of 26 February 2014 on the award of concession contracts;
- DIRECTIVE 2009/81/EC of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security;

- DIRECTIVE 2007/66/EC of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts ("*Rechtsmittelrichtlinie*").

Additionally, these European Public Procurement Directives bear a significant impact from the World Trade Organizations Agreement on the Government Procurement (GPA). Since the European Union in its entirety is one of the 21 member countries to this plurilateral agreement, it is bound to abide with the rules set out in the GPA. This chain of triggered impetuses from the GPA to the EU legislation and from the EU legislation to the German Public Procurement legislation demonstrates that the Public Procurement laws in Germany are characterized by a cascading structure emanating from Germany's supra-national relations.

2. What types of public procurement / government contracts are regulated in your jurisdiction and what procurement regimes apply to these types of procurements? In addition to any central government procurement regime please address the following: regulated utilities procurement regime (e.g. water, gas, electricity, coal, oil, postal services, telecoms, ports, airports), military procurements, non-central government (local, state or prefectures) and any other relevant regime. Please provide the titles of the statutes/regulations that regulate such procurements.

In Germany, the public procurement regulations are multifaceted, differentiating between industries and types

of performance. A "Get to know" the German Public Procurement law has its starting point in the Fourth Part of the **Act against Restraints of Competition ("GWB")**, which lays down the core general provisions for public procurement procedures in Germany. This Part comprises of two chapters with provisions on the award procedure (Chapter 1) and on the review procedure (Chapter 2). In the first chapter a reader will face regulations on the scope of application, principles and definitions, the course of the award procedure, on the procedural types, candidate's eligibility criteria, grounds for exclusion, the award of the contract through to the performance conditions and contract amendment, followed by a separate section on awarding contracts in special areas and concessions. Chapter 2 contains provisions for the review procedure before the public procurement chambers and for the procedure before the public procurement senates of the higher regional courts.

It is essential to know, that the GWB general provisions are applicable to all public procurement procedures, which lie above the specified value thresholds for a public bid. Also, depending on the sector and on the type of performance additional regulatory framework supplement the GWB-general provisions or even replaces them.

Special industry procurement regimes:

Some industries are characterized by unique specifics, which are not common to all other industries, this resulting in the necessity of their special regulation in terms of public procurement.

For instance, supplies and services in the areas of transport, drinking water supply and energy supply (utilities procurement) are specially regulated in the Ordinance on the awards of Public contracts by entities operating in the water, energy and transport sectors ("**Sektorenverordnung – SektVO**").

The defense and security sector is on the other hand specially regulated in the Ordinance on the Award of Public contracts by Contracting Authorities or Entities in the Field of Defense and Security ("**VSVgV**").

For the construction sector, the Federal legislator has passed the German Construction Contract Procedures, in which Part A explicitly govern the construction procurement contracts ("**VOB/A**").

Each of the above mentioned and other sector-oriented ordinances in Germany are meant to take the industry-specific characteristics under consideration, thus ensuring a tailored-specific approach to each sector and procuring adequate legislation for exceptional

constellations. The procurement of supply and service contracts, which do not fall in any of the specific industries is regulated by the **Public Procurement Ordinance ("Vergabeverordnung – VgV")**, which is always applicable in supplementation to the general GWB-procurement provisions.

Unified public procurement contracts:

In the IT sector the German legislator has drafted unified Public Procurement Contractual Terms and Conditions depending on the type of the owed performance, which are widely used to provide the general terms and conditions for the particular procurement procedure in supplementation of a Statement of Work Document or any special Terms and Conditions set out in the tender documents. Those Unified Supplementary Contractual Terms and Conditions are labeled with the abbreviation *EVB-IT* followed by the particular type of the purchased deliverables. Together with the two still valid *Special Contract Terms for the Procurement of IT Systems and Equipment (BVB)* the EVB-IT contracts now cover almost the entire range of applications for IT procurement in the public sector. The eleven EVB IT contracts and the two BVB contracts in force provide the entire contractual framework for public sector IT procurements and define in detail performance requirements in the IT sector. All types of EVB-IT (**EVB-IT Purchase, EVB-IT Services, EVB-IT Cloud, EVB-IT System, EVB-IT Licensing Type A, EVB-IT Licensing Type B, EVB-IT Maintenance, EVB-IT Creation, EVB-IT System delivery, EVB-IT Hardware maintenance, EVB-IT Lease**) are accessible on the website of the Federal Government for Information Technology and can be downloaded for free at [CIO Bund – EVB-IT](#).

3. Are there specified financial thresholds at which public procurement regulation applies in your jurisdiction? Does the financial threshold differ depending on the nature of procurement (i.e. for goods, works or services) and/or the sector (public, utilities, military)? Please provide all relevant current thresholds in your jurisdiction. Please also explain briefly any rules on the valuation of a contract opportunity.

The above described German procurement law – specifically Part 4 GWB and the Procurement Ordinances apply in accordance with § 106 GWB only when the estimated contract value reaches or exceeds the respective EU threshold value (so-called upper threshold range). The respective thresholds are derived from the provisions of the respective EU directives to which

reference is made in § 106 GWB. In accordance with § 106 para. 3 GWB, the German Federal Ministry for Economic Affairs and Energy publishes the applicable thresholds immediately after they have been published in the Official Journal of the European Union for the particular year.

The following EU thresholds apply from January 1, 2024 onwards:

Public Procurement Directive (2014/24/EU)	Utilities Directive (2014/25/EU); Defense and Security Directive (2009/81/EC)	Concessions Directive 2014/23/EU
Construction services: € 5,538,000.00	Construction services: € 5,538,000	Concessions: € 5,538,000
Supplies and services: €221,000.00	Supplies and services: € 443,000	
Central government authorities: €143,000.00		

To ascertain whether the stipulated threshold is met, the contracting entity needs to gauge a likely contract value. The method of determination of the contract value is codified in § 3 of the **Public Procurement Ordinance ("VgV")**, according to which the assessment of the contract value must rely on the anticipated overall worth of the intended service, excluding VAT, thus taking under consideration any optional contract renewal possibilities.

4. Are procurement procedures below the value of the financial thresholds specified above subject to any regulation in your jurisdiction? If so, please summarise the position.

Traditional budgetary law applies to Public procurement bids below the threshold values. The following regulations apply via corresponding references in the Federal Budget Code and in the state budget ordinances/state procurement laws:

- Rules of procedure for the award of public supply and service contracts below the EU thresholds awarded by the federal government (**Below-value Threshold Procurement Regulation – UVgO**)
- Below-value threshold Procurement Regulation (UVgO) (in the version applicable to the state) or corresponding state procurement laws for awards at state and municipal level; As In some federal states, the application of the UVgO is not mandatory for local authorities

applicable are the **Procurement and Contract Regulations for Services, Part A**, Section 1: Provisions for the Award of Services (**VOL/A**).

- **Procurement and Contract Regulations for Construction Services, Part A**, Section 1: General Provisions for the Procurement of Construction Services (**VOB/A**)

5. For the procurement of complex contracts*, how are contracts publicised? What publication, journal or other method of publicity is used for these purposes? What is the typical period from the publication of the advert that bidders have to respond to the advert for a complex contract?

In general, there is no single, prescribed national medium for publication for all types of public tenders in Germany. The contracting authority determines where and how to publish a new public procurement contract based on the contract value, not on the complexity of the contract. The border lines are the EU prescribed financial thresholds. The announcement of national public tenders below the financial thresholds is made in daily newspapers, internet portals or official publication gazettes (Section 12 (1) No. 1 VOB/A or VOL/A). For all German tenders in the above-threshold area and for all European tenders regardless of their value, publication in the online portal "Tenders Electronic Daily" of the Official Journal of the European Union is mandatory. The contracting authorities are bound to use for the publications the European standard forms provided by the Information System about European Public Procurement (SIMAP).

The regulations for deadlines in the above-threshold area, are more extensive and detailed than for the below-value threshold tenders. These deadlines apply to all EU-wide tenders in all EU member states. Depending on the type of tender procedure the authority has chosen the minimum deadlines for a submission of proposals vary from 25 to 35 days. For example:

- The open procedure requires a minimum of 35 days for the receipt of proposals, however, if electronic submission is accepted or mandatory, the deadline is shortened to 30 days;
- In the restricted procedure, the deadline for receipt of requests to participate is set at a minimum of 30 days. Subsequently, the deadline for submitting tenders in this procedure is also 30 days, with the possibility of reduction to 25 days if electronic submission accepted or prescribed.

- For procedures involving negotiation rounds, the deadline for submission of proposals is 30 days from the call of competition and this can be further reduced to 25 days in the case of electronic submission.

- Economic and financial standing,
- Technical and professional capacity.

Complex contracts may however require longer periods for the bidder to develop a solution concept and draft a proposal. Therefore, the legislator has prescribed the prerequisite of “adequacy” for the particular situation. In case the prescribed minimum deadlines are not realistically sufficient for a proper proposal submission, deadlines must be prolonged. Bidders are allowed to request extensions by raising a so called bidder question (“Bieterfrage”).

6. For the procurement of complex contracts, where there is an initial selection stage before invitation to tender documents are issued, what are typical grounds for the selection of bidders? If there are differences in methodology between different regulated sectors (for example between how a utility might undertake a regulated procurement procedure and how a government department might do so), please summarise those differences.

According to § 42 VgV in the restricted procedure, the negotiated procedure with a call for competition, the competitive dialog and the innovation partnership, the contracting authority shall invite only those candidates to submit a tender **who have demonstrated their eligibility and have not been excluded.**

The contracting authority shall verify the eligibility of candidates or tenderers on the basis of:

- the eligibility criteria laid down in § 122 GWB and
- the absence of grounds for exclusion in accordance with § 123 and § 124 GWB and,
- where appropriate, measures taken by the candidate to redeem itself in accordance with § 125 GWB

A bidder is eligible for selection if it meets the criteria (eligibility criteria) specified in detail by the contracting authority for the proper performance of the public contract. This criteria must relate exclusively to the following:

- Qualification and license to practice the profession,

7. Does your jurisdiction mandate that certain bidders are excluded from tendering procedures (e.g. those with convictions for bribery)? If so, what are those grounds of mandatory exclusion? Are there any notable features of how this operates in your jurisdiction e.g. central registers of excluded suppliers? Does your jurisdiction specify discretionary grounds of exclusion? If so, what are those grounds of discretionary exclusion?

The grounds for the exclusion of bidders from a procurement procedure in Germany are set out in §§ 123, 124 GWB, §§ 57, 42 (1) VgV and § 16 VOB/A. They are divided into mandatory grounds for exclusion (§ 123 GWB) and optional grounds for exclusion (§ 124 GWB).

Mandatory grounds for exclusion do not leave the contracting authority any room for discretion, but impose a duty to exclude a candidate. Pursuant to § 123 GWB, such grounds are, for example, conviction by a final judgment for financial fraud, money laundering, bribery of a public official, tax fraud, omission of an entity to pay duties or social security contributions, founding of or participation at a terroristic organization. Exclusion on those grounds can per exception be waived if this is necessary for compelling reasons in the public interest or if exclusion would be manifestly disproportionate (§123 para. 5 GWB). To aid contracting authorities in assessing whether a company meets any of the grounds for exclusion outlined in § 123 GWB, the Federal Cartel Office (“Bundeskartellamt”) in Germany maintains a nationwide electronic registry called the **Competition Registry (“Wettbewerbsregister”)**.

Another mandatory grounds for exclusion can be found in § 57 VgV for tenders from companies that do not meet the eligibility criteria and in § 53 VgV for tenders that do not meet the formal requirements. In particular, bid proposals that have not been received in due form or time, that do not contain the required or subsequently requested documents, in which changes to the tenderer's entries are not clear and in which changes or additions have been made to the tender documents are mandatory to be excluded.

The discretionary grounds for exclusion are laid down in § 124 GWB. Such are for example conflict of interest, distortion of competition, serious misconduct in the course of bidder's professional activities, insolvency

proceeding, violation of applicable environmental, social or labor law obligations in the performance of public contracts.

8. Please describe a typical procurement procedure for a complex contract. Please summarise the rules that are applicable in such procedures. Please include a timeline that includes the key stages of the process, including an estimation for the total length of the procedure.

In Germany, complex contracts are typically tendered through a negotiated procedure with a call for competition.

Following the general preparation and publication of the contract notice in the Tenders Electronic Daily (TED), the contracting authority initiates the call for competition, inviting interested parties to request participation. Eligibility proofs are to be submitted together with the participation requests, and the authority assesses applicants based on predefined criteria. Only eligible candidates proceed to the proposal phase. In the negotiation procedure, the contracting authority may reserve the right to award the initial bid or engage in negotiation rounds for second or final proposals. The negotiation procedure allows one or more negotiation rounds, ensuring equal treatment of all bidders who submitted initial offers. After inviting bidders to submit their best and final offers (so called BAFOs), the contracting authority evaluates them based on specified award criteria, awarding the contract to the most economical bid. The notice of awarded contracts is subsequently published in the TED. Throughout the negotiation procedure, applicants and bidders can pose questions, answered anonymously by the contracting authority. The following summary illustrates the negotiation procedure initiated by a call for competition:

Initiation phase	<ul style="list-style-type: none"> • Preparation of the tender documents • Contract announcement in "Tenders Electronic Daily" • Distribution of the tender documents
Call for competition	<ul style="list-style-type: none"> • Answering questions from bidders • Opening the requests to participate
Application review	<ul style="list-style-type: none"> • Eligibility review of the bidders • Selection of eligible bidders
Proposal phase	<ul style="list-style-type: none"> • Invitation to tender • Answering questions from bidders • Opening of the initial proposals
Proposals review	<ul style="list-style-type: none"> • Formal assessment of the initial proposals • Appropriateness/adequacy of the initial proposals
Negotiation phase	<ul style="list-style-type: none"> • Negotiation phase(s) with interim offer(s) • Invitation to submit final offer • Answering bidder questions • Evaluation of the final bids
Contract award	<ul style="list-style-type: none"> • Rejection of non-considered bidders • Duty to wait 10 to 15 days after notifying unsuccessful bidders • Award of contract • Publication of awarded contracts in Tenders Electronic Daily

The duration of a negotiated procedure with a call for competition in Germany can vary and depends on various factors. There is no set standard duration as each procurement process is unique. Some of the factors that can influence the duration include: complexity of the contract, number of negotiation rounds, communication with bidders, complexity of contract negotiations, resources of the parties involved. Although there are minimum deadlines for each of the above shown phases of the negotiation procedure, it is never the case that complex contracts are awarded within the shortest possible period of time. Counting with at least 30 to 35 days for each phase, in the best possible scenario a negotiation procedure with call for competition will take approximately 6 months.

9. If different from the approach for a complex contract, please describe how a relatively low value contract would be procured. (For these purposes, please assume the contract in question exceeds the relevant threshold for application of the procurement regime by less than 50%)

Relatively low-value contracts rarely require a negotiation procedure with call for competition. When the contracting authority has no special eligibility requirements for the bidders and there is no need or reason for a negotiated procedure as the complexity of the contract does not suggest such, the procuring authority will most likely

choose to proceed with the so called open procedure. This is the classic procedural type in the German procurement regime and is used for bids above the respective EU threshold values. With the exception of the areas of defense and security, it is provided for all other procurement sectors and can be used as a standard procedure without justification. An open procedure is a so-called single-stage procedure, i.e. there is no upstream competition or downstream negotiation phase.

After the general preparation and publication of the notice in the TED, an open procedure starts directly with the bidding phase. Since the open procedure, as described above, does not provide for an a priori eligibility assessment, any interested bidder can submit a proposal. Bidders must be provided with all documents from the outset, as well as be informed of the deadline for submitting an offer. Interested parties submit a proposal by the deadline together with the proof of meeting the eligibility criteria. Candidates have the opportunity to ask questions during the bidding period. The contracting authority will anonymize the bidder questions and answer them all simultaneously and transparently. The received proposals will then be evaluated by the awarding authority and the contract will be awarded to the economically most advantageous offer.

10. What is seen as current best practice in terms of the processes to be adopted over and above ensuring compliance with the relevant regime, taking into account the nature of the procurement concerned?

Best practices in Germany involve not only compliance with the legal requirements, but also an emphasis on sustainability, innovation, social and environmental considerations. For instance, an increased attention and value is given to the digitalization in the public procurement procedures. The choice of digital correspondence and the submission of bid proposals in an electronic way is stimulated by the contracting authorities in order to increase efficiency and decrease use of paper materials in the procedures. Another key best practice is a corporate policy to maintain sustainable supply chains. At the beginning of 2023 the German Federal legislator passed the new Supply Chain Duty of Care Act, or Supply Chain Act for short ("*Lieferkettensorgfaltspflichtengesetz*"), which regulates corporate responsibility for compliance with human rights in global supply chains. This includes, for example, protection against child labor, the right to fair wages and environmental protection. Simply said, companies ought to procure that in their entire supply chain human rights

violations do not occur. In the light of this new regulation, bidders, which manage to prove an implemented strong concept for the maintenance of sustainable supply chains will get better score during the bid evaluation phase.

11. Please explain any rules which are specifically applicable to the evaluation of bids.

Bids in procurement procedures in Germany are evaluated based on various criteria, most of which is pre-defined already in the tender documents. In addition, evaluation methods may vary depending on the chosen type of procurement procedure (open, restricted, negotiation procedure). What is always being checked, however, is whether the formal criteria, such as completeness or correctness of the documentation, have been met.

For the decision-making process, the following aspects typically play a role:

Price: The price of the bid is often a crucial criterion. In many cases, the economically most advantageous offer is determined, taking into account adherence to the budget and potential discounts.

Quality: The quality of the offered services or products is another significant evaluation factor. This can be substantiated through technical specifications, references, or other proof of quality.

Experience and Expertise: The bidder's experience and expertise may be assessed to ensure that the contractor possesses the necessary competence for the successful execution of the project.

Delivery Time: Depending on the nature of the contract, the delivery or completion timeframe can be an important criterion, especially for time-sensitive projects.

Sustainability and Environmental Aspects: In more and more procurement procedures, sustainability gains importance. Bidders may be encouraged to implement eco-friendly practices or meet specific environmental standards.

Contractual Terms: Acceptance of contractual terms may also be evaluated to ensure that the bidder agrees to the conditions set by the public entity.

It's essential to note that the precise evaluation method and relevant criteria are specified in the procurement documents. These documents provide bidders with clear instructions on how their bids will be assessed, ensuring

a fair and transparent procurement process.

12. Does your jurisdiction have specific rules for the treatment of bids assessed to be "abnormally low" for the purposes of a particular procurement (i.e. a low priced bid, significantly lower than any other bid or a bid whose pricing raises questions of sustainability/viability over the contract term)? If so, is there a definition of what "abnormally low" means and please can you provide a short summary of the specific rules?

In Germany, tender proposals that seem unusually low by significantly deviating in price from other bidders' offers or from the public authority's meticulously calculated contract value estimate, are subject to a strict scrutiny by the procuring authority. The public authorities have the general duty to identify such abnormally low tenders by conducting **an initial assessment**. The existing procurement regulations, such as § 60 VgV, § 16d VOB/A, and § 44 UVgO, which address abnormally low tenders, however lack a specific definition for "abnormally low tenders" and fail to provide exact indications when a bid shall be considered as abnormally low. Therefore, the case law on this topic bears a significant importance for the decision-making of the authorities.

As per German case law, an abnormally low bid exists if the gap between the lowest bid in price and the next-best bid is 20% ("**pick-up threshold**"). Upon reaching this threshold, the authority is obliged to conduct a price-check by inquiring on additional information/documentation from the bidder. If the provided information does not verify the adequacy of the tender proposal or if the bidder rejects to cooperate with the provision of that information, the bid may be excluded from the tender. On the other hand, if the price difference to the next highest bid is less than 10% there is no duty for the authority to scrutinize the bid.

Upon failure to conduct a closer scrutiny on bids with prices lower than 20% compared to the other bids, the authority's final decision for the tender may be brought by the other bidders into a review proceeding in front of designated chamber, as according to the German court practice this omission constitutes a violation of the rights of the other bidders.

13. Please describe any rights that unsuccessful bidders have that enable them to receive the

reasons for their score and (where applicable in your jurisdiction) the reasons for the score of the winning bidder. Are regulated procuring bodies required to provide these reasons for their award decision before awarding the contract in question?

Unsuccessful bidders in Germany are afforded various rights under the Act against Restraints in Competition (GWB) and the Ordinance on the Award of Public Contracts (VgV) aimed at ensuring transparency and fairness throughout the public procurement process.

As per § 134 GWB contracting authorities must inform tenderers who will not to be awarded the contract of the reasons for rejection and of the name of the company whose tender has been selected. This notification duty of the authority is a prerequisite for the conclusion of the contract, which may only be signed 15 or 10 calendar days (depending on the way of sending the notification notice) after all unsuccessful bidders have been notified of the information referred to above. Additionally, bidders have the right to be informed about the factors considered in evaluating their proposals (§ 15 VgV). An exception of the notification duties is foreseen in the case of defense or security-related contracts.

Unsuccessful bidders can request access to the tender documents in order to understand the decision-making process more comprehensively (§ 19 VgV). The contracting authority may decide against disclosing certain information concerning the award of a contract or the conclusion of a framework agreement where such disclosure would: (1) impede law enforcement, (2) be against the public interest (especially defense or security interests), (3) harm the legitimate commercial interests of companies, or (4) potentially harm fair competition between them.

If dissatisfied, bidders can raise objections against award decisions in accordance with § 160 GWB. Legal recourse includes proceedings before Procurement Chambers, which have the authority to review complaints related to award decisions.

14. What remedies are available to unsuccessful bidders in your jurisdiction? In what circumstances (if any) might an awarded contract be terminated due to a court's determination that procurement irregularity has occurred?

Where a bidder assumes that it has been unlawfully disadvantaged during an ongoing procurement procedure or in the awarding of the contract, they are entitled to file an application for review with the competent procurement chamber of the federal state, §§ 155 subseq. GWB. If the subjective rights of the bidder defined in § 97 para 6 GWB have been demonstrably violated by the contracting authority and the contract has already been awarded, the procurement chamber will issue a declaratory judgment for infringement of rights. If the procurement procedure is still ongoing, in accordance with § 168 GWB, the procurement chamber shall take the appropriate measures to remedy the infringement and prevent damage to the interests concerned. Such measures are at the discretion of the awarding chamber.

On the one hand, the chamber can rule with an obligatory act addressed to the procuring authority. Other possible measure of the public chamber is to return the procedure to an earlier stage and to oblige the contracting party to carry out the procedure from this stage without the legal error, for example not to exclude a wrongly excluded bidder and to consider it in the next evaluation stages or not to award the contract to a bidder with a bid that is not the most economical and to repeat the award evaluation. If the violation of rights cannot be remedied by a postponement, the awarding chamber can also cancel the procedure completely. Additionally, in case the decision of the chamber appears to be dissatisfactory pursuant to § 171 GWB an immediate appeal against decisions of the procurement chamber is admissible to the higher regional court of jurisdiction.

On the other hand, unsuccessful bidders whose rights have been infringed may file a claim for damages. Claims for damages are not to be brought before the public procurement chambers, but through the ordinary courts (§156 (3) GWB). As per § 181 GWB, a company can claim damages for the costs of preparing the tender or participating in the award procedure if it would have had a real chance of being awarded the contract, but this was impaired by the breach of law.

A further claim can also arise according to the principles of "culpa in contrahendo": the claim for compensation for loss of profit. If the claim is successful, the suing bidder is to be placed in the same position as it would have been in if it had been awarded the contract. For contracting authorities, the obligation to pay positive damages is the "worst case". If the "wrong" bidder was awarded the contract, the contracting authority must not only compensate the unsuccessful bidder for the provision of services, but also pay the loss of profit of the plaintiff bidder.

The primary legal protection is however less formalized for tenders below the value-thresholds under public procurement law. The review procedure by the public procurement chamber is not admissible here. Companies can seek primary legal protection in below-value threshold bids by asserting claims for defense and injunctive relief against unlawful award decisions in interim legal protection.

15. Are public procurement law challenges common in your jurisdiction? Is there a perception that bidders that make challenges against public bodies suffer reputational harm / harm to their prospects in future procurement competitions? If so, please provide brief comment. Assuming a full hearing is necessary (but there are no appeals), how much would a typical procurement claim cost: (i) for the defendant and (ii) for the claimant?

According to the official statistics for 2022, a total of 702 applications for a review proceeding were submitted to the public procurement chambers, and appeals were lodged in 18.2 % against the outcome of the review proceedings. Compared to 2021, when 865 applications were filed, the numbers are significantly falling. The review proceedings reached an all-time low in 2022, with the exception of 1999, when also 702 applications were received. The reasons for this decreasing tendency are of various nature. For example, if a review application in the sense of § 160 GWB or the immediate appeal in the sense of § 171 GWB is proved to be unjustified from the outset, the applicant or the appellant shall be obliged to compensate the opposing party and the parties involved for the damage they have suffered as a result of the abuse of the right for review or appeal. Bidders refrain from filing for review if there is a certain risk of monetary claims against them in case of an unfavorable decision by the chamber.

Furthermore, although it is stipulated that triggering a review proceeding shall not lead to any detrimental consequences for the requesting party, the human factor shall be taken into account when considering bringing a procedure in front of the Public procurement chambers. A common use of the review procedure by an entity might leave the impression of a "trouble-maker" and make such bidder undesirable to the public authorities, thus leading them to conduct a stricter scrutiny when reviewing their bid proposals. Therefore, the challenges brought to the attention of the chambers are the ultima ratio among the bidders in Germany, even when the possibility for a

favorable ruling by the chambers is high.

The public procurement chamber must make its decision on the review application within a period of five weeks and state its reasons. Within this period both parties would be heard and/or have the chance to submit written statements. The fee for proceedings before the procurement chamber is between EUR 2,500 and EUR 50,000, in exceptional cases can reach up to EUR 100,000. The amount of the fee depends on the amount in dispute and the complexity of the proceedings. The minimum fee of EUR 2,500 can be reduced to EUR 250 for reasons of fairness, as well as the maximum fee of EUR 50,000 can be increased up to an amount of EUR 100,000 in individual cases, if the invested effort or economic significance is exceptionally high.

16. Typically, assuming a dispute concerns a complex contract, how long would it take for a procurement dispute to be resolved in your jurisdiction (assuming neither party is willing to settle its case). Please summarise the key stages and typical duration for each stage.

The period for resolution of public procurement disputes in Germany depends on the complexity, the location and the type of the dispute. Whereas the review proceeding is by statutory regulation no longer than five weeks, an instant appeal against the chamber's decision before the Higher Regional Courts will last much longer. Before the Higher Regional Court, the principle of expedited proceedings expressly provided for the review proceedings at the procurement chambers in § 113 GWB does not apply. The appeal will commence with a certain period for submission of written statements from both parties – the appellant and the public procurement chamber. Most highly, the court will request also a statement from the contracting authority. The deadlines for each statement and the opportunity for each party to respond to the other party's allegations last between 4 and 8 weeks. After acquiring from each party a statement and a response to the other party's statement, court will proceed with scheduling a hearing. Depending on the burden of the courts, which vary significantly in the different federal states in Germany, a first hearing may get scheduled for within two to six months. At the outset of the hearing, the judge will conduct a settlement procedure ("*Güteverhandlung*") and attempt to convey the parties to settle. If neither party is willing to settle, than the court will proceed with hearing of the party's statements and with the witness statements. If by the end of the hearing all facts are straight, no second hearing is needed and a decision can be made, the judge

shall either announce its decision or issue an award no later than three weeks after the hearing. The overall length of the litigation dispute may so be between six and eighteen months, if neither of the parties request continuation or change of hearing dates. In reality however, deadline extensions are requested almost for every submission, which is why litigation proceedings in Germany can last for several years.

17. What rights/remedies are given to bidders that are based outside your jurisdiction? Are foreign bidders' rights/remedies the same as those afforded to bidders based within your jurisdiction? To what extent are those rights dependent on whether the host state of the bidder is a member of a particular international organisation (i.e. GPA or EU)?

The general rule in Germany is that all bidders to a public procurement procedure have the same rights/remedies and must adhere to the same rules and conditions, when participating at a tender ("principle of equal treatment").

However, some exceptions from this general rule have been introduced with the adoption of the European Regulation (2022/1031/EU) amending the International Procurement Instrument (IPI) by August 2022. With the IPI measures, the EU seeks to tackle the problem of third countries (such as USA, Japan, China), which are either not members of the GPA and therefore, or are GPA members, but despite that impose restrictive practices in their own public procurement markets on foreign bidders, resulting in the loss of significant trade opportunities for the EU. Companies from such countries are now being subjected to the so called IPI restrictions in the EU procurement procedures and may be even denied access to public contracts. The ultimate goal of the IPI Directive is to make third countries open up their markets for foreign bidders and adopt similar public procurement practices as those set out in the GPA. One way to do so is to motivate such countries to become members of the GPA by way of consultations during a public procurement procedure, which is one of the IPI measures codified in the EU directive. Another example of an IPI measure, which in nature restricts the access of bidders from such third countries, is the adjustment of the proposal valuation of foreign bidders. In other words, price proposals from third country-based bidders would be assessed at a higher price than the price actually proposed.

18. Where an overseas-based bidder has a subsidiary in your territory, what are the applicable rules which determine whether a bid from that bidder would be given guaranteed access to bid for the contract? Would such a subsidiary be afforded the same rights and remedies as a nationally owned company bidding in your jurisdiction?

With the incorporation of a subsidiary in Germany, according to German law the newly formed German entity is entitled to the same rights and remedies like all other German companies. The subsidiary is also not a subject to IPI measures and will not get in the crosshairs of a potential exclusion from tender procedures. Nowadays, this ground rule for equal treatment of all German nationals does not apply per exception for subsidiaries of Russian nationals, which are subjected to European economic sanctions.

19. In your jurisdiction is there a specialist court or tribunal with responsibility for dealing with public procurement issues? In what circumstances will it have jurisdiction over a public procurement claim?

The competence to resolve public procurement matters in above-thresholds bids in Germany lies at first instance with the Public Procurement Chambers, which are however not a traditional court body, but an institution in the public administration. The chambers render their decisions as an administrative act, against which the tenderer may file an instant appeal within 14 days before the Higher Regional Court of jurisdiction. Designated senates within the Higher Regional Courts deal solely with the resolution of public procurement matters. Dispute matters in below-threshold bids are on the contrary being handled in the civil courts.

20. Are post-award contract amendments/variations to publicly procured, regulated contracts subject to regulation in your jurisdiction? Are changes to the identity of the supplier (for example through the disposal of a business unit to a new owner or a sale of assets in an insolvency situation) permitted in your jurisdiction?

In Germany, post-award contract amendments/variations to publicly procured, regulated contracts are allowed if

specific prerequisites are fulfilled. The permissibility of post-award contract amendments is addressed in § 132 GWB and § 39 para 5 VgV. Contract amendments may be done when (1) the amendment option was initially provided for in the procurement documents, (2) do not alter the overall nature of the contract, **and** (3) was not foreseeable at the time of contract award. Substantial changes in the nature of the contract require a new procurement procedure. What is meant by a substantial change is defined in § 132 para. 1 GWB. According to this, substantial changes are changes that result in the public contract differing significantly from the original contract. In addition, § 132 para. 1 sentence 3 GWB contains an exemplary, albeit non-exhaustive, list of cases in which changes are to be regarded as substantial. For example, a substantial material change exists if conditions are to be introduced that would have enabled the acceptance of a tenderer other than the one originally awarded (No. 1 lit. b). Furthermore, a substantial material change is assumed if the change would shift the economic balance of the contract in favor of the contractor (No. 2). Subsequent changes are also material if the scope of the public contract is significantly expanded as a result of the change (No. 3) or the "old" contractor is replaced by a new contractor (No. 4).

Changes to the identity of the supplier, for example, through the disposal of a business unit to a new owner or a sale of assets in an insolvency situation, are addressed in § 4 GWB. In cases of asset sales or changes in ownership, the new supplier may need to meet the qualification criteria specified in the original procurement process. The contracting authority must assess whether the change affects the supplier's ability to meet these criteria. It is crucial for parties involved in public procurement to adhere to the regulations governing post-award contract amendments and changes to the identity of the supplier. Failure to comply with these regulations may result in legal challenges or the termination of the contract

21. How common are direct awards for complex contracts (contract awards without any prior publication or competition)? On what grounds might a procuring entity seek to make a direct award? On what grounds might such a decision be challenged?

Direct awards for complex contracts, i.e., contract awards without any prior publication or competition, are relatively uncommon for the German procurement market. In Germany, the public procurement laws generally emphasize on the principles of competition and

transparency. The admissibility of direct awards for above-value threshold contracts is limited and subject to specific conditions. A procuring entity might seek to make a direct award based on the following grounds, as outlined in the relevant regulations:

- 3 para 1 GWB: When no suitable competing offers are available.
- 3 para 2 GWB: Due to urgency, such as in emergency situations or unforeseeable events.
- 12 VgV: In specific sectors, such as defense and security, or if some "special and exclusive rights" are involved.
- 14 VgV: In the social service sector under conditions specified in the regulation.

A decision to make a direct award might be challenged on various grounds, such as: failure to meet the conditions outlined in the regulations above, lack of transparency, procedural errors, violation of equal treatment. In order to mitigate the risk of legal challenges, it is therefore essential for procuring entities to carefully assess and document the circumstances justifying a direct award.

22. Have your public procurement rules been sufficiently flexible and/or been adapted to respond to other events impacting the global supply chain (e.g. the war in the Ukraine)?

As the global supply crisis emerged firstly due to the COVID-pandemic and subsequently due to the war in Ukraine, prices have been on the rise on day-by-day basis, which led to tremendous losses and lots of insolvency cases for all those contractors who held procurement contracts with fix pricings and no price

adjustment clauses. In response to the economic difficulties experienced by a lot of the awarded contractors, the German legislator has imposed a duty in certain procurement areas to include a Cost of living adjustment clauses (COLA) in order to protect the contractors from bankruptcy. Also the EVB-IT contracts were amended and supplemented by the inclusion of a COLA clause in each of the EVB-IT modules.

The public procurement laws in Germany underwent some changes also in the light of the war outbreak in Ukraine. A contract performance ban was introduced with regard to already concluded contracts, where the contractor itself is direct subject to an economic sanction due to its connection to Russia. Such contracts were to be terminated by October 10, 2022. In the event that sub-contractors, suppliers or companies whose capacities were used as part of the supply chain and suddenly fell within the personal scope of application of the EU economic sanctions due to their connection to Russia, the contractor had to terminate the business relationship with the relevant sub-contractor or supplier in connection with the performance of the contract by October 10, 2022. Otherwise, the public contract would have been terminated by the procuring authority. Claims for damages in connection with the termination of contractual relationships are legally excluded under Article 11 of the Sanctions Regulation.

Additionally, a ban on awarding contracts to persons and companies with a connection to Russia round up the sanction package imposed by the EU on the Russian Federation. In order to comply with the newly introduced ban, contracting authorities in Germany now require from all bidders to provide proof in the form of a self-declaration that they have no connection to Russia as part of the procurement procedure.

Contributors

Paolina Ilieva
Partner

paolina.ilieva@kp-partners.de

